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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 265

THE WORLD FIRE & MARINE INSURANCE COMPANY,

Petitioner

vs.

BOWDEN L. PALMER AND JOHN BRUNO, JR.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WM. H. WATKINS,
P. H. EAGER, JR.,
THOS. H. WATKINS,
MRS. ELIZABETH HULEN,
Jackson, Mississippi.

WATKINS & EAGER,
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SUPREME COURT OF THE UNITED STATES

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THE WORLD FIRE & MARINE INSURANCE COMPANY,

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vs.

BOWDEN L. PALMER AND JOHN BRUNO, JR.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled cause on the 7th day of June, 1950, affirming the judgment of the District Court (R. 400).

Judgment Below

The opinion of the Court of Appeals (R. 415) is unreported. A copy is made *Appendix 1* hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on June 7, 1950 (R. 415). A petition for rehearing was filed by petitioner June 30, 1950, fifteen days additional delay

having been given therefor (R. 430). Petition for rehearing was denied July 18, 1950 (R. 438). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The federal questions presented herein were not made in the District Court but were presented for the first time in petition for rehearing. The deprivation of federal rights complained of arose for the first time in the opinion of the Court of Appeals (R. 431). *Great Northern Railroad Co.* v. *Sunburst Oil Co.*, 287 & S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-8; *Ohio ex rel. Bryant* v. *Akron Park District*, 281 U.S. 74, 79; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; *Saunders* v. *Shaw*, 244 U.S. 317, 320; cf. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 162-4.

Time for applying for certiorari begins from the date of the overruling of petition for rehearing. *Department of Banking* v. *Pink*, 317 U. S. 264, 87 L. Ed. 254, rehearing denied 318, U. S. 802, 87 L. Ed. 1166; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316.

Questions Involved

1. Whether at the time the loss occurred there was in force any state or municipal ordinance regulating the construction or repair of buildings which prohibited the repair of the damaged building.

2. Whether or not consistent with the 14th Amendment to the Constitution of the United States, Sections 1, 17 and 24 of the Constitution of Missisippi, and Section 14 of the Bill of Rights of the State of Mississippi, departmental officers of the City of Jackson had authority or discretion, acting summarily without notice or hearing, to construe the applicable ordinances of the City of Jackson as prohibiting the restoration of the building and precluding petitioner from a judicial review thereof.

3. Whether or not where, as in the present case, respondents had the absolute right to restore the building after the fire, the departmental municipal officers had discretionary authority summarily and without notice or hearing to construe the ordinances as to prevent restoration of the building without causing said ordinances to violate the 14th Amendment to the Constitution of the United States, as well as the applicable sections of the Mississippi State Constitution hereinbefore set out and to deprive petitioner of its property without due process of law.

4. Whether or not the Court of Appeals committed error in setting aside and disregarding the findings of the District Judge had upon oral testimony, sitting without a jury, and supported by the undisputed proof in the case.

5. As to whether or not the Court of Appeals committed error in holding that in determining as to whether or not the ordinances of the City of Jackson permitted restoration of the building after the fire, the market value of the building before the fire, separate from the land, instead of the sound value should prevail.

Statement

On September 12, 1947, petitioner issued to respondents what is known as a rent insurance policy, being a renewal of one issued the year previous. A copy of the policy is made *Appendix 2* to this petition. By the terms thereof the petitioner agreed to indemnify the respondents against loss of rentals by fire, on the property described, used for commercial purposes and rented as offices and stores. The basic policy covered loss of rentals during the time necessary to restore the premises to the same tenantable condition as before the fire. The policy did not cover loss of rentals due to "any ordinance or law regulating construction or repair" and it was provided that no increased liability existed due to the "acts of civil authorities". In addition to the basic

coverage, there was attached a special endorsement entitled "Demolition Clause" (R. 384) containing the following language:

> "Demolition and Increased Cost of Construction Clause (Rents)
>
> "In consideration of $75.00 additional premium, this Company shall be liable, in case of loss or damage under this policy, for loss or damage to the interest hereby occasioned by the enforcement of any State or Municipal law or ordinance regulating the construction or repair of buildings and in force at the time such loss occurs.

There was in force as of January 1, 1947, the Zoning Ordinances of the City of Jackson. Appropriate ordinances appear in findings of the District Judge (R. 395).

Section 7 thereof contained the following language:

> "Section 7. PRESENT USE TO CONTINUE: Be it further ordained, that the lawful use of land existing at the time of adoption of this ordinance, although such use does not conform to the provision hereof, may be continued, but if such non-conforming use is discontinued, any further use of said premises shall be in conformity with the provision of this ordinance."

Section 65 (a) of the Municipal Ordinances (R. 393) prohibited repairs if in excess of 50% of the value of the building. Section 65 (b) prohibited repair or restoration of buildings if there is a change in the use or occupancy. Section 67 prohibited the construction or repair of a building without obtaining a permit from the Building Inspector. Section 68 mandatorily provided for the issuance of a permit where the application was in compliance with the Municipal Code, copy of which ordinance is made Appendix 3.

A fire occurred June 8, 1948 partially damaging the building and rendering it uninhabitable without repairs. The petitioner admitted liabilty under the basic provision and

offered to pay for loss of rents incurred for the time reasonably necessary to repair the building, shown to have been not exceeding three months. It is conceded that the rental income from the property at the time of the fire was $350.00 per month. The respondents, however, asserted liability under the Demolition Clause and demanded the sum of $5,000.00, the full face of the policy, as to which the petitioner took the position that there was no state law or municipal ordinance regulating the construction or repair of the building in the City of Jackson which would prevent the restoration thereof; that upon the other hand, the petitioner took the position that the respondents had the unconditional right, under the applicable municipal ordinances, to restore the building to condition as before the fire and there was no liability under the Demolition Clause. On April 2, 1949, respondents filed a complaint in the United States District Court against petitioner (R. 2). The complaint made no allegation that there was any state law or municipal ordinance of the City of Jackson at the time of the fire preventing the restoration of the building, alleging a refusal on the part of the municipal authorities to grant a permit to the respondents to restore the building, and that by reason thereof they were entitled to recover from the petitioner the face of the policy; otherwise, they asked for a reformation of the policy so as to require the Demolition Clause to include unlawful refusal on the part of the municipal officers to grant the permit. The petitioner answered the complaint (R. 9) denying any right of recovery as well as any right of reformation, specifically alleging that there was no state or municipal law or ordinance preventing the restoration of the building, and that, therefore, the petitioner was not liable for any amount other than the loss of rentals incurred other than on the basic provision in the policy. It appeared that

the City Engineering Department refused to issue the perfit and there was no board or commission of the City of Jackson with authority to give notice and have a hearing to determine whether or not a permit should be granted under the municipal ordinances. The construction of the municipal ordinances and the conclusion of the municipal officers refusing a permit was had by a departmental officer acting summarily without notice or hearing.

At the trial of the cause before the District Judge, though not pleaded, the respondents contended that there was liability under the Demolition Clause because (a) the alterations and repairs required were in excess of 50% of the value of the existing building 65 (a); (b) there was a change of use and occupancy under 65 (b); (c) the respondents asserted the right to a reformation of the policy extending the coverage of the Demolition Clause to include wrongful acts of city officials in refusing the permit; (d) that in determining as to whether or not the repairs to restore the building exceeded 50% of the value thereof though the market value of the building, separate from the land, should be the determining factor.

It was the position of the petitioners that in determining the question that what is known as the sound value rule should be used. After hearing the testimony the District Judge made an elaborate finding of facts and conclusions of law, beginning (R. 382). The Court found:

1. The fire occurred June 8, 1948. The rents received from the building were $350.00 per month; that the potential rental value of the property was $450.00 per month as to which there was no kind of dispute.

2. That in the year 1946, prior to the passage of the zoning ordinances, the municipal authorities had permitted the residence to be converted into non-conforming commercial property as they had permitted many other pieces of prop-

erty during the same period in the same vicinity to be converted. Therefore, under Ordinance No. 7, the respondents were lawfully using the property as commercial property at the time of the fire (R. 187). This finding was supported by the undisputed proof (R. 42), (R. 187), (R. 194), (R. 385-386).

3. The Court held that the damage by fire to the building was less than 50% of its sound value, probably 40% (R. 391). The undisputed testimony in the case showed that the extent of the damage to the building was much less than 40% based upon the sound value, E. B. Sweat (R. 220-222, 227-229), S. Post (R. 232, 234, 239), Mr. Clymer (R. 184), respondents' estimates (R. 109, 110, 114).

4. The Court held that there was no discontinuance of usage and occupancy as provided in Section 65 (b), when, if the building had been repaired, it was the purpose of the owners to continue to rent it for the same use and occupancy that existed before the fire (R. 397). This finding is supported by the undisputed proof in the case (R. 70-71, 77-78, 89, 187, 194).

5. The Court found that reasonable prudence would require the owners to file a petition for mandamus to have compelled the granting of the permit (R. 392).

6. The Court held that the respondents were not entitled to reformation of the policy.

7. The Court found that the municipal officers illegally and wrongfully refused to grant the permit and that they might have been compelled to do so by mandamus though the Court said they acted in good faith.

8. The Court held that immediately after the fire the Assistant City Engineer informed the parties that the property was in Zone No. 1. That being true, since the dam-

age exceeded 20%, it was not permissible to repair the same relying upon the information given by the City Engineer, the adjuster, realizing that liability would exist in such instances, offered to pay twelve months' rent at $350.00 per month, which offer the respondents declined; they said they were entitled to $5,000.00. In a few days the adjuster discovered that the Assistant City Engineer was mistaken; that the property was in Zone No. 2, and Ordinances 65 (a) and 65 (b) applied; whereupon, he withdrew the offer and the Court found that the adjuster acted in the utmost good faith as to which there is no dispute (R. 394).

Conclusions of Law (R. 397)

The Court held, as a matter of law:

1. That the city authorities were in error in refusing the permit.

2. The Court denied respondents' prayer for reformation (R. 399). Judgment was entered in favor of the respondents against the petitioner for $4,200.00. Appeal was prosecuted to the United States Court of Appeals by petitioner, which resulted in the affirmance of the judgment. The United States Court of Appeals was unable to approve the reasons given by the District Judge for rendering judgment against the petitioner since such reasons extended the coverage of the policy so as to cover the unlawful acts of city officers which was not covered by the Demolition Clause and would have given respondents the benefit of reformation although denied. The United States Court of Appeals held, however, that the city authorities summarily and without notice or hearing had discretionary power to construe the municipal ordinances and to determine as to whether or not restoration of the building was permitted under the city ordinances (R. 424), although the District

Judge specifically held that the refusal to grant the permit was not because it was claimed that the damage to the building equalled 50% but solely on the ground that there would be a change of occupancy (R. 388).

The Court of Appeals further held that in determining as to whether or not damage to the building exceeded 50% of the value of the building, the market value that is to say what it would sell for, separate from the land, and not the sound value, was the determining factor in deciding as to whether or not the damage to the building exceeded 50% (R. 425). For such reasons the judgment of the District Court was affirmed.

Specification of Errors To Be Urged

The Court of Appeals erred:

1. In holding that municipal departmental officers, without notice or hearing, had the authority and discretion to hold that the municipal ordinances regulating the construction or repair of buildings in force at the time of the fire prohibited restoration of the building to the condition before the fire.

2. In holding that the decision of the city administrative officers was final and superseded the findings of the District Judge and precluded a judicial hearing.

3. In setting aside the findings of the District Judge in the hearing had without a jury, largely on oral testimony, supported by the undisputed evidence in the case.

4. In holding that in determining the extent of the damages suffered by the building in the fire, the "market value" of the building, apart from the land, not the "sound value" should control.

5. In affirming the order of the District Judge.

Reasons Relied On For Allowance of the Writ

REASON I: The Court of Appeals has decided an important question of local law in a way in conflict with Mississippi decisions.

(a) This decision is in direct conflict with the applicable decisions of the Supreme Court of the State of Mississippi, in that it has held that the question as to whether or not a building so damaged may be repaired is a judicial question determinable in a judicial inquiry and that any construction of such ordinances as would confer such discretion upon a municipal officer and prohibit the restoration of the building would be conferring judicial authority upon such departmental officer, violating Section 1, Section 14 of the Bill of Rights of the State of Mississippi, Sections 17 and 24 of the Constitution of the United States. *Jones* v. *City of Hattiesburg,* 42 So. 2d 717, 207 Miss. 491; *Town of Union* v. *Ziller,* 151 Miss. 467, 118 So. 293; *Bradley* v. *City of Jackson,* 153 Miss. 136, 119 So. 811, 816; *Moreau et al. School Trustees* v. *Grandich,* 35 So. 444, 114 Miss. 560; *Clark* v. *Board of Trustees,* 117 Miss. 234, 78 So. 145.

(b) The decision of the Court of Appeals is also in direct conflict with the applicable decision of the Supreme Court of Mississippi, in that the Court of Appeals held that in determining as to whether or not the building was damaged in excess of 50% of its value, that the determining factor should be the "market value" of the building separate and distinct from the land, instead of the "sound value" as found by the district judge. *Palatine Ins. Co.* v. *Kate Nunn,* 55 So. 44, 99 Miss. 439.

The decision is contrary to the decisions of other courts of appeal upon the same question. *Travellers Indemnity Co.* v. *Plymouth Box & Panel Co.,* (C.C.A. 4) 99 F. 2d 218;

Svea Fire & Life Ins. Co. v. *State Savings & Loan Association,* 19 F. 2d 134; *Continental Insurance Company* v. *Garrett,* (6th Cir.) 125 F. 589; *Rutherford* v. *Royal Ins. Co.,* (C.C.A. 4) 12 F. 2d 880.

REASON II: The United States Court of Appeals has decided an important federal question in conflict with applicable decisions of this Court, in that it has decided that although the owner of property damaged by fire has the right under the municipal ordinances to restore the same to the same condition as before the fire, that mere departmental officers of the municipality, without notice or hearing, have the authority and discretion summarily to construe and enforce such municipal ordinances as to prohibit the restoration of the building and that the owner is precluded thereby from a judicial hearing, *Southern Railway Co.* v. *Virginia,* 290 U. S. 190, 78 L. Ed. 260; *Margaret Shea Lynch* v. *United States,* 292 U. S. 571, 78 L. Ed. 1434; *Frank Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 83 L. Ed. 1423; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220; *Chicago M. & S. Railway Co.* v. *State,* (Minn.) 14 U. S. 318, 44 L. Ed. 970; *Wichita R. R. & Light Co.* v. *Public Utilities Co.,* 216 U. S. 48, 67 L. Ed. 124; Ex Parte Young, 209 U. S. 123.

REASON III: The decision of the Court of Appeals is in direct conflict with the decision of other courts of appeal on the same matter. *New Hampshire Fire Ins. Co.* v. *Murray,* (7th Cir.) 105 F. 2d 212; *St. Paul Fire & Marine Ins. Co.* v. *Eldracher,* (8th Cir.) 33 F. 2d 675; *Barry* v. *Hall,* (App. D. C.) 98 F. 2d 222; *City of Cincinnati* v. *Webster,* 33 F. 2d 242, affirmed 281 U. S. 439, 74 L. Ed. 605; *Mayor and Aldermen of Jersey City* v. *Central R. Co.,* (3rd Cir.) 212 F. 76; *Yuen Boo Ming* v. *United States,* (C.C.A. 9) 103 F. 2d 355.

REASON IV: The Court of Appeals has rendered a decision in conflict with the decisions of other circuit courts of appeal in the same matter and has decided a federal question in a way probably in conflict with applicable decisions of this Court, in that the Court of Appeals has disregarded the findings of the District Judge, supported by the undisputed evidence in the case. *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.,* (10th Cir.) 179 F. 2d 541; *Peterson* v. *Donovan,* (10th Cir.), 177 F. 2d 411; *Crimmins* v. *Woodson,* (4th Cir.) 177 F. 2d 788; *Rupple* v. *Kuhl,* (9th Cir.) 177 F. 2d 823; *Mavromatis* v. *United Ship Owners Corp.,* (1st Cir.) 179 F. 2d 310; *Woods* v. *Oak Park Corp.,* (7th Cir.) 179 F. 2d 611.

Conclusion

Petitioner respectfully submits that this is an appropriate case for the granting of a writ of certiorari. The Court of Appeals has decided important questions of insurance, commercial and constitutional law. Aside from the interest of petitioner therein, the questions are of great public importance.

The latest form of coverage offered by fire insurance companies is known as the "Demolition Clause" involved in this case. Fire insurance companies are pioneering in writing this form of insurance. There is no reported case dealing therewith. Under this clause the petitioner contracted to indemnify the respondents against loss of rents provided there was a statute or municipal ordinance dealing with the repair or construction of buildings preventing the restoration thereof. The question as to whether or not there was coverage under the Demolition Clause and liability on the part of petitioner therefor was a question for judicial determination. According to the express findings of fact of the District Judge, there was no statute or

ordinance preventing the restoration of the building and it was the absolute mandatory duty of the municipal authorities to issue the permit. The issuance of the permit was denied on the ground of change of occupancy, when, under the undisputed proof, the District Judge held that there would be no change of occupancy.

However, the Court of Appeals held that notwithstanding the findings of the District Judge, based on the undisputed proof, the representative of the City Engineering Department, without notice or hearing and free from judicial supervision, had the discretionary power to construe the applicable ordinances. Such rule would create confusion and uncertainty. Municipal officers might, without notice or judicial review, construe the ordinance one day as justifying the permit or they might deny the same.

It is important that such a business as that of petitioner and other insurance companies, whether stock, reciprocal or mutual, willing to undertake the hazard contained in the Demolition Clause, should be permitted to have its rights determined upon the contract between the parties and not on the discretionary determination by departmental officers. Such a rule would create confusion. The coverage is one of great importance and should be made available to persons desiring the same. It would be impossible for the coverage to be furnished, however, if departmental officers have the discretion to determine the extent of coverage.

But, not only that, the Court of Appeals disregards and sets aside the findings of the District Judge based on undisputed oral proof. Also, the Court of Appeals decided that the correct rule of determining the extent of damage to the building is the "market" or "junk" value, an announcement at variance with the construction placed thereupon by the municipal authorities in the present instance, directly opposed to the Supreme Court of Mississippi

thereupon, in conflict with other Courts of Appeal dealing with the subject matter, as well as every adjudicated case in this country on the subject. The announcement of the Court of Appeals in this case that the "market value" or "junk value" instead of the "sound value" controls stands alone in American jurisprudence. A mere statement of the proposition demonstrates the appropriateness of the granting of the Writ of Certiorari prayed for in this case.

We submit that the writ should be granted as prayed for and the judgment of the Court of Appeals reversed as to the recovery under the Demolition Clause, and that respondents have recovered under the basic provisions of the policy.

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Petitioner

v.

BOWDEN L. PALMER AND JOHN BRUNO, JR.,

Respondents

BRIEF FOR PETITIONER

The opinion of the Court of Appeals filed June 10, 1950, reported *The World Fire & Marine Insurance Company* v. *Bowden L. Palmer and John Bruno, Jr.*, has not been officially reported, is printed in the record at page 415, and is made Appendix 1 to this brief.

Basis for Jurisdiction

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at Page 1 of the foregoing petition and is, by reference, adopted as a part of this brief.

Statutes Involved

This case involves the construction of Section 1 of the Constitution of the State of Mississippi, Section 14 of the Bill of Rights of the Constitution of the State of Mississippi, Section 17 of the Constitution of the State of Mississippi, Section 24 of the Constitution of the State of Mississippi,

Federal Rules of Civil Procedure for the District Courts of the United States, 52 (a), and Sections 3590, 3591, 3593 and 3595, Mississippi Code of 1942, all of which are made *Appendix 4* to this brief.

The applicable ordinances of the City of Jackson involve Sections 7, 65(a), 65(b), 68 and 187. Section 68 is set out herein; the remaining municipal ordinances will be found in the findings of the District Judge (R. 393, 394, 395, 396).

Argument

Point I

The Law of the State of Mississippi Is Controlling in This Case

Section 1652, Title 28 U. S. C.

Woods, Petitioner v. *Interstate Realty Co.*, 337 U. S. 535, 93 L. Ed. 1524; *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64; *Russell* v. *Todd*, 309 U. S. 280; *Wichita R. Co.* v. *City National Bank*, 306 U. S. 103; *Guaranty Trust Co.* v. *York*, 326 U. S. 99.

Point II

The Contract Sued on Comprises the Policy with the Indorsements Thereon and the Applicable Municipal Ordinances

Western Assurance Co. v. *Phelps*, 27 So. 745, 77 Miss. 625.

Point III

The Burden of Proof Was On the Respondents In This Case To Prove By a Preponderance of the Evidence That There Was Some State Statute or Municipal Ordinance Regulating the Construction or Repair of a Building Prohibiting the Restoration of the Building

Charles J. Searls v. *Western Assur. Co.*, 88 Miss. 260, 40 So. 866; *Soelberg* v. *Western Assur. Co.*, 119 F. R. 23, 55 C.C.A. 601; *Porter* v. *Still*, 63 Miss. 357, *Y. & M. V. R. R. Co.*

v. *M. Levy & Sons,* 141 Miss. 199, 106 So. 525; *Mask* v. *Allen,* 17 So. 82; *Mississippi State Highway Comm.* v. *Hillman,* 195 So. 670, 198 So. 565, 189 Miss. 580; *Gilmore* v. *The United States* (5th Cir.) 93 F. 2d 774, certiorari denied 304 U. S. 569, 82 L. Ed. 1534.

Point IV

The Coverage in the Policy of Insurance May Not Be Extended By Construction

The Supreme Court of Mississippi has repeatedly held that an insurance company may restrict its coverage as it sees fit.

The undisputed proof has established and the district judge has found that, under the facts in the case, the restoration of the building to its condition before the fire was permissible; that being true, judgment would have been entered for the petitioner on the demolition clause. It did not insure against the illegal acts of municipal officers in refusing to issue the permit. The Court of Appeals recognized that the District Judge had extended the coverage.

In the case of *Newman* v. *National Fire Ins. Co.,* 118 So. 295, 152 Miss. 344, the Court used the following language:

> "Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause."

The Supreme Court of Mississippi has repeatedly held that coverage under no circumstances can be extended by construction. *American Life & Acc. Co.* v. *Nidlinger,* 73 So. 875, 113 Miss. 84, A.L.R. 871; *Continental Cas. Co.* v. *Hall,*

80 So. 605, 118 Miss. 871; *Southern Home Ins. Co.* v. *Wall*, 127 So 298, 156 Miss. 865; *Locomotive Engineers' Mut. Life & Acc. Ins. Co.* v. *Meeks*, 127 So. 699, 157 Miss. 97; *Georgia Casualty Co.* v. *Cotton Mills Products Co.*, 132 So. 73, 159 Miss. 396.

The Supreme Court of New Jersey has decided a case, *Scher* v. *Hartford Fire Ins. Co.*, 30 Atl. 2d 33, which we submit is in point. In that case a tenant having a long lease on a commercial building used for a dance hall took out a policy with the insurer to indemnify himself against the right of the owner to cancel the lease in the event that following a fire the landlords were of the opinion that it was necessary to rebuild the house. There was a fire. The landlords took the position that the building on economical grounds, being a monstrosity, should not be rebuilt. The insured tenant acquiesced therein and sued the insurer on the policy. The trial court on the facts held that rebuilding of the structure was not necessary but it could be restored by repairs and there was no liability. The judgment was affirmed, using the following language:

> "Rebuilding was not necessary. In the light of the uncontradicted testimony given by the landlords' attorney that the building was old, a monstrosity, triangular in shape, and that it had been hard to rent and that it could be put to a more profitable use entirely negatives the theory that the building was so badly damaged as to make rebuilding necessary. The landlords may not escape their obligation to repair because in their judgment it would be unwise to invest the money necessary because of the stated conditions. The plaintiff's loss was due to the unwarranted action by the landlords and not due to the fire loss within the meaning of the policy."

In the case of *Security Ins. Co.* v. *Rosenberg* (Ky.) 12 S. W. 2d 688, the court used the following language:

> "If the loss was not occasioned by the fire, but by an improvident order of condemnation, the insurer is not responsible under its contract, for it did not insure against such loss."

It may be that it was economically unsound to restore the building or contrary to the financial interests of respondents to do so but, unless such restoration was prohibited by state statute or municipal ordinance, there is no coverage under the Demolition Clause and the petitioner not liable therefor.

Point V

The Construction of the Municipal Ordinances As Conferring Discretionary Authority on the Departmental Officers to Construe and Enforce Such Ordinances, Without Notice or Hearing, Precluding Judicial Hearing, Would Have the Effect of Causing the Ordinances to Violate the Due Process Clause of the Constitution of the United States as Well as the Sections of the Mississippi Constitution Hereinbefore Referred to

Since the damage to the building did not exceed 50% of its value (in fact it was between 30% and 40%) and the owners contemplated no change of occupancy under Sections 7 and 68 of the Municipal Ordinances, the owners had the absolute unconditional right to restore the building, which right was a property right protected by the Constitution of the State of Mississippi and the 14th Amendment to the Constitution of the United States, and the refusal of the departmental officers to grant the permit was illegal, wrongful, and without right, and necessarily arbitrary.

It must be borne in mind that the municipality had provided no Board or Commission with the right to give

notice, have a hearing and determine as to whether or not under the municipal ordinances the building was subject to restoration. In the present instance the authority was vested in the Inspector or City Engineer. The latter acted through one of his assistants and without notice or hearing summarily ruled that the building could not be restored and directed that it be demolished unless repaired in accordance with the municipal regulations, which meant construction of a new building. The law is well-settled in Mississippi that where this State or a municipality acts through a departmental Board or Commission with provision for notice and hearing and the same is had, that there is a presumption of correctness as to the ruling of such department and the order may not be attacked if based upon substantial evidence, unless against the overwhelming weight of authority. *Dixie Greyhound Lines, Inc.* v. *Miss. Public Service Comm.*, 190 Miss. 704, 200 So. 579.

Right of judicial review of an order of an administrative board, even where there has been notice and hearing, is deeply rooted in the jurisprudence of this country. See the case of *Wong Yang Sung* v. *J. Howard McGrath* (decided February 20th, 1950), Adv. Sheet, Vol. 94, L. Ed. p. 388. It must be understood, however, that in the present case there was no notice or hearing, or provision therefor.

It must also be understood that we are not attacking the right of the municipality to pass ordinances or the validity of the ordinances passed by the municipality, as to which the city has large discretionary powers. *Jackson* v. *McPherson*, 162 Miss. 164. We are complaining of the fact that a departmental officer, without notice or hearing, was held to have discretionary powers, that is to say, judicial power to construe the same. The question has been most recently reviewed by the Supreme Court of

Mississippi in *Jones* v. *City of Hattiesburg,* 42 So. 2d 717, 207 Miss. 491. In that case, as here, the property owner under the municipal ordinances had the absolute right to construct the building involved. The city engineer, a departmental officer, without notice or hearing summarily denied the permit. The Supreme Court of Mississippi, in reversing the case used the following language:

> "* * * that the action of the city authorities in denying such use of the property is an unreasonable and arbitrary interpretation of the zoning ordinance which tends to deprive the company of its property and the use thereof, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, and Sections 14 and 17 of the Mississippi Constitution of 1890. . . .
> "Reversed and judgment here."

In the case of *Town of Union* v. *Ziller,* 118 So. 293, 151 Miss. 467, the Court used the following language:

> "The ordinance here involved is restrictive of the rights of the owners of private property and must be strictly construed; and the words of the ordinance will not be construed by the court so as to enlarge their meaning beyond the usual, ordinary significance thereof."

A very interesting case is *State* v. *McPhail,* 180 So. 387, 182 Miss. 360. There under a general statute the Governor of the State was authorized to call out the militia to suppress crime. His official action was brought in question and while the same was ultimately approved, in response to the argument advanced by the State that the action of the Governor was not subject to judicial review, the court used the following language:

> " * * * but whenever they, or any of them, or any other officer acting or assuming to act for the govern-

> ment, puts into action any agency which comes into collision with the private personal or private property rights of any person within the jurisdiction of the state, such personal and property rights of the citizen and their infringements are always subject to inquiry and redress by the courts, as against any unauthorized act by any officer of the state, whatever his character and rank may be."

In the case of *Moreau et al School Trustees* v. *Grandich,* 114 Miss. 560, 75 So. 434, where the trustees of a school sought to exclude a pupil on account of race the court said that the question was a judicial one which the courts would determine de novo.

In the case of *Watkins* v. *State Board of Pharmacy,* 170 Miss. 26, 154 So. 277, it was held that the State Board of Pharmacy could not cancel the license of a licensed pharmacist except through judicial proceedings.

In the case of *State ex rel* v. *McDowell,* 111 Miss. 596, 71 So. 867, the court held that the appellee McDowell could not be summarily removed from office except by judicial determination de novo.

Further citation of authorities on that point would be unnecessary here. The cases are set out under Paragraph (a) "Reasons Relied on for Allowance of the Writ."

Point VI

The Decision of the Court of Appeals That the Municipal Officers Had Discretionary Authority Summarily and Without Notice of Hearing to Construe the Municipal Ordinances and Determine as to Whether or Not Restoration of the Building Was Permissible Thereunder Precluding Judicial Determination Thereof, Which Construction Deprived the Petitioner of Its Property Without Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States

This decision is in direct conflict with the case of *Southern Railroad Company* v. *Virginia*, 290 U. S. 190, 78 L. Ed. 260. In that case the highway commissioner, without notice or hearing, advised the appellant that elimination of a certain grade crossing was necessary and must be had. This Court used the following language:

> "This Court has often recognized the power of a state acting through an executive officer or body to order the removal of grade crossings, but in all these cases there was the right to a hearing and review by some court. See Great Northern R. Co. *v.* Minnesota, 246 U. S. 434, 62 L. Ed. 817, 38 S. Ct. 346; Erie R. Co. *v.* Public Utilities Commrs., 254 U. S. 394, 65 L. Ed. 322, 41 S. Ct. 169, P.U.R. 1912C, 143; Lehigh Valley R. Co. *v.* Public Utility Comrs. 278 U. S. 24, 73 L. Ed. 161, 49 S. Ct. 69, 62 A.L.R. 805."

The Court also used the following language:

> "The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed. The cause will be

remanded for further proceedings not inconsistent with this opinion."

In the case of *Margaret Shea Lynch* v. *United States of America*, 292 U. S. 571, 78 L. Ed. 1434, this Court held that a claimant to war risk insurance arising out of a contract with the United States Government could not, consistent with the Fifth Amendment to the Constitution of the United States, be deprived of a judicial consideration thereof. The Court used the following language:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, *whether the obligor be a private individual, a municipality, a State or the United States.* Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. . ."

In the case of *Frank Hague, et al.* v. *Committee for Industrial Organization*, 370 U. S. 496, 83 L. Ed. 1423, the Court held that a municipality could not invest a departmental officer summarily without notice or hearing to determine as to whether or not permit should be granted for public assembly in or upon streets or highways.

In the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220, the municipal authorities construed the ordinances as conferring upon them authority to grant or refuse permission to operate a bakery. Just as in this case the city engineer granted the permit as he pleased to one person, and refused it to another.

In the case of *State of Washington* v. *George W. Roberge*, 278 U. S. 115, 73 L. Ed. 210, the Court held that an ordinance required two-thirds of the property owners within four hundred feet of the proposed building to determine the granting of permit therefor and without any right of judicial review thereof violated the Fourteenth Amendment

to the Constitution of the United States. The Court used the following language:

> "... The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. * * * Yick Wo *v.* Hopkins, 118 U. S. 356, 366, 368, 30 L. Ed. 220, 225, 226, 6 Sup. Ct. Rep. 1064. The delegation of power so attempted is repugnant to the due process clause of the 14th Amendment.

Other authorities are cited under reason No. 3 relied on for the allowance of the writ, to which reference is now made.

Point VII

The Decision of the Court of Appeals Is In Direct Conflict With the Decisions of Other Circuits as to the Deprivation of Constitutional Rights Under the Fourteenth Amendment By Granting to a Departmental Municipal Officer Authority Without Notice or Hearing to Discretionarily Construe the Ordinances and Determine Whether or Not the Permit Will Be Issued Without Right or Judicial Review

In the case of *New Hampshire Fire Insurance Company* v. *Murray*, Seventh Circuit, 105 F. (2d) 212, the question was directly involved. In that case the appellant would have been liable for a total loss under a fire insurance pol-

icy where a wooden building was damaged in the fire limits to the extent of 50% of its value, and the ordinance provided that the extent of the damage should be determined by three disinterested residents. These persons, without notice or hearing, examined the building and determined that it was damaged to the extent of 80% of its value. Whereupon the administrative council directed that the building be demolished. The appellant filed suit in the United States District Court to set the award aside as not being supported by substantial evidence. The District Judge on hearing all the conflicting testimony held that the order of the council was void, that the appellant was entitled to a judicial hearing thereon and set aside the abatement order. On appeal to the Court of Appeals, it held that since there was no notice or hearing that the action of the common council was not the equivalent of an administrative adjudication and no presumption prevailed as to its correctness. The Court used the following language:

> "We are acquainted with the principles of administrative law, which have won a place in our jurisprudence, and we know that generally it may be said that administrative adjudications, consistent with procedural due process and proper statutory authorization, are accorded the same respect as judicial determinations. Our analysis in the instant case, however, leads us to conclude that the situation involved here is not worthy of the usual administrative autonomy. In brief, as we shall develop below, the administrative declaration in question is not the equivalent of an administrative adjudication."

The Court, therefore, held that the appellant was entitled to a de novo trial:

> "* * * Since the plaintiff was refused a hearing, it would seem that he was entitled to a hearing in the courts. Our task, in such a case, would be to review

> the findings of the district court, where the hearing was given."

The Court held that since the finding of the board was not conclusive that the same was subject to de novo judicial determination.

The Court held that since a finding of the District Judge was based upon substantial evidence his decision should be affirmed. The Court used the following language:

> "Therefore, since the record substantially supports the findings of the district court, the decree of that court, to the extent that it enjoins the enforcement of the abatement order of the common council here in question, is affirmed."

Other relevant cases will be found under Reasons for Granting the Writ, Reason III.

Point VIII

The Court of Appeals Erroneously Held That in Determining Whether or Not the Building Was Damaged in Excess of 50% of Its Value That the Market Value of the House, Separate from the Land, Should Be The Determining Factor

The undisputed proof shows that using what is known as the "sound value rule," the original cost of construction less depreciation as compared with the extent of the damage to the building was found by the District Judge to be the correct formula for determining the question. The District Judge announced that he would not be controlled by the "market value," but would follow what is known as the "sound value rule."

In the June, 1950 edition of the American Bar Association Journal, there was a lengthy discussion of the sub-

ject matter by Mr. Harry Perlet of Washington, D. C., where the following statement is contained:

> "It is a well-known fact among laymen, lawyers and insurance men that 'actual cash value' does not mean the same as the original cost of the building or even its present replacement cost. It means the actual value at the time of loss which generally is the replacement cost less depreciation."

See *First Investment Co.* v. *North British & Mercantile Ins. Co.*, 33 F. 2d 785, and cases cited therein.

The Supreme Court of Mississippi has adopted the uniform rule of "sound value." The question was presented in the case of *Palatine Ins. Co.* v. *Kate Nunn*, 55 So. 44, 99 Miss. 493. In that case the house was damaged by fire, the property was worth about $3500.00, of course, using the "sound value"; the damage was $1400.00, and the city ordinance in the fire Zone No. 1 prohibited the repair of the building where the damage exceeded 20% of the value. The Court held that the loss was a total one and the insurer paid the full face of the policy.

In the case of *Citizens Ins. Co.* v. *Barnes*, (Fla.) 124 So. 722, exactly the same method of computing cash value as applicable to partial damage under a municipal ordinance was adopted, the court using the following language:

> "The uncontradicted evidence shows that the building was damaged to more than 50% of the cost of reproducing, and therefore, if the building was any frame building, the ordinance referred to applies."

In the case of *Travelers Indemnity Co.* v. *Plymouth Box & Panel Co.*, 99 F. 2d 218, (4th Circuit), where the insurer endeavored to get the court to adopt the rule on "market

value,'' Judge Chessnut, sitting on the court, used the following language:

> ''* * * Market value is of course the standard rule when we are dealing with the kind of property which is freely and currently bought and sold; . . . In various cases, depending upon the nature of the property to be valued evidence may properly be received as to the original cost, and cost of replacement, with due allowance for depreciation.''

In the case of *Continental Ins. Co. v. Garrett,* (C. C. A. 6) 125 F. 589, Judge Lurton, speaking for the Court, announced the following rule:

> ''Sound value is the cash value, making allowance for depreciation due to use, etc., at and immediately preceding the time of the fire.''

The following cases are directly in point and announce the foregoing rule that the ''value'' of a building means cost of reconstruction less depreciation and not ''market value'' and there are no cases to the contrary:

> Britven *v.* Occidental Ins. Co. (Cal.), 13 N. W. 2d 793; Boise Ass'n of Credit Men Ltd. *v.* U. S. Fire Ins. Co., 256 P. 523; Kennedy *v.* Treleaven (Kan.), 165 Pac. 977; State Ins. Co. *v.* Taylor (Col.), 24 Pac. 333; Mason *v.* Fire Association (S. Dak.), 23 S. Dak. 431; Mesce *v.* City of Chicago, 23 N. E. 2d 188 (Ill.); Citizens Savings Bank & Trust Co. *v.* Fitchburg Mutual Fire Ins. Co. (Vt.), 86 Vt. 267, 84 Atl. 881; Jetter *v.* Hofheins (Pa.), 70 N. Y. S. 2d 808; Rowell *v.* Janvrin, 151 N. Y. 60, 45 N. E. 398; Glens Falls Ins. Co. *v.* Garner (Ala.), 155 So. 533; Lee *v.* Providence Washington Ins. Co., 266 Pac. 640.

The Court of Appeals overlooked the rule that the meaning of the word ''value'' must be determined from the

context. In 66 Corpus Juris, at page 418, the following rule is announced:

> "It has long been recognized that 'value' may be used in different senses. That the true meaning of a word is to be determined by its context is peculiarly true of 'value'."

Point IX

The Court of Appeals Committed Error In Setting Aside and Disregarding the Findings of the District Judge Who Sat Without a Jury and Heard the Case on Oral Testimony

The holding of the Court of Appeals was in direct conflict with applicable decisions of this court and other courts of appeal dealing with the same matter.

The rule is well settled under Federal Rules of Civil Procedure 52(a) that the finding of the district judge may not be set aside if based on substantial evidence. Section 52(a), Federal Rules of Civil Procedure, has the force of an act of Congress. *Mississippi Publishers Corporation* v. *Dennis Murphree,* 326 U. S. 438, 90 L. Ed. 185; *Hertha J. Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 85 L. Ed. 479.

The district judge, sitting without a jury, heard on oral testimony, made a finding of fact that there was no municipal ordinance preventing the restoration of the building. The Court of Appeals erroneously held that such finding of the district judge should be disregarded merely because on the extent of the damage to the building the estimate of 30% made by the assistant engineer was not approved by Mr. Martin. The undisputed proof is that Mr. Martin, the city engineer never made a detailed appraisal or an estimate of the damage but admitted that the estimate by the assistant showed that the extent of the damage did not exceed 30% (R 183-184). The city

engineer did not refuse the permit because of the estimate of the damage but the permit was refused because, in his opinion, a new occupancy was contemplated after the fire (R. 191, 193, 194, 196). A legal conclusion which was untenable.

The Court of Appeals further called attention to the fact that S. S. Taylor testified as to the "market" or "junk" value of the building. The district judge held that the "sound" value was applicable. The city engineer, Mr. Martin, testified that he never heard of the use of "sale" value being used in determining the extent of damage after a fire but that the "sound value rule" was always used. (R. 180-181, 183-184). The district judge found that the refusal to issue the permit was not on the ground of extent of value to the building but change in use and occupancy. (R. 388)

The finding of the district judge could not be set aside, however, even if there should be a conflict with the one witness. This holding is directly in conflict with the decision of this Court in *Walling* v. *General Industries Co.*, 330 U. S. 545, 91 L. Ed. 1088, where the court used the following language:

> "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed. The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witnesses. The District Court heard the witnesses, and was the proper judge of their credibility."

Cases from other court circuits will be found under Reason IV relied on for allowance of the writ.

WHEREFORE, Your Petitioner Respectfully Prays that a writ of certiorari issue under the Seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered 13,055, The World Fire & Marine Insurance Company, Appellant and Cross-Appellee versus Bowden L. Palmer and John Bruno, Jr., Appellees and Cross-Appellants, and that the judgment and decision of the Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief as to the Court may seem meet and proper.

WM. H. WATKINS,
P. H. EAGER, JR.,
THOS. H. WATKINS,
MRS. ELIZABETH HULEN,
Counsel for Petitioner.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(No. 13,055)

THE WORLD FIRE & MARINE INSURANCE COMPANY, *Appellant and Cross-Appellee*

vs.

BOWDEN L. PALMER AND JOHN BRUNO, JR., *Appellees and Cross-Appellants*

Appeal and Cross-Appeal from the United States District Court for the Southern District of Mississippi

(June 7, 1950)

Before HUTCHESON, Chief Judge, and BORAH and RUSSELL, Circuit Judges.

RUSSELL, Circuit Judge: This case involves the proper construction and application of the terms and provisions of a policy of insurance against loss of rent. Appellees, hereinafter referred to as the insureds, in 1945, purchased a lot near the business district of Jackson, Mississippi, upon which was located a two story residence building which had been constructed around the year 1900, in at that time, a fashionable residential section. With the growth of the city, the expanded business section encroached upon the premises and surroundings and the building underwent the familiar transformation from home to dwelling house, and from dwelling to boarding house uses, in decreasing degrees of custom and continuous occupancy. As is also usually true in such cases, the physical condition of the building deteriorated, while the land value increased, because of the anticipatory value of the lot for business use. The insureds agreed to pay $40,000.00 for the property. The house represented a minor part of the purchase price since the lot, 68 by 160 feet, had a value of approximately $30,000.00.

The lot, under the zoning ordinances of the city, was located in the commercial zone, and this induced its purchase by the insureds, since they planned to dispose of the structure and erect a business building. The insureds rented the property for use as a boarding house until the early part of 1946. At that time, in view of the shortage of space for offices and stores occasioned by the growth of the city and the stoppage of any construction during the war, the building department of the city granted permission for a change of use and occupancy of the building to commercial purposes, but refused permission to make any additions, structural changes or enlargements. After spending approximately $1600.00 in repairing the property, the insureds leased quarters in the building to four separate tenants, for a rental aggregating $5,000.00 annually. The insureds were able to obtain fire insurance on the building in the amount of only $7,500.00. When changing to commercial use, with substantial rents accruing, they desired additional insurance against loss from fire, but were informed by the insurance agent that since the structure would justify no additional fire insurance, their best means of protection was to secure a policy of rent insurance. It was understood that there was a real danger that in case of fire, making repairs to the building necessary, the city authorities would not permit such repairs unless the entire building was made to structurally conform to the requirements of the zoning ordinances applicable to commercial buildings in such locations. One of these requirements forbade the making of replacements or repairs in excess of fifty per cent of the value of the building. In order to secure the additional protection, the insurance agent contacted many companies and finally secured from the appellant, hereinafter referred to as the insurance company, the policy of insurance against loss of rents upon which the present suit in the Trial Court was predicated.

The usual rent-loss policy evidences only an agreement to pay such amount as is sustained by loss of rents occasioned by fire during the time reasonably required to repair the property, computed from a construction standpoint alone. This usual rent policy endorsement, (also a part of the present policy, does not provide additional protection

in case the insured is unable to secure a permit authority from the city to restore the building.) To provide protection for this contingency, the additional rider or endorsement now involved was issued upon the payment of a one hundred per cent additional premium. The policy thus obtained was once renewed and was in force at the time of the fire which damaged the building on June 8, 1948. Thus, at the time of the fire, there was in effect the material provisions of the basic policy,[1] a standard rent endorsement,[2] and a "Demolition and Increased Cost of Construction Clause" endorsement.[3]

After the fire the insureds secured estimates of the cost of repairs in the amount of $6,208.00 and applied to the proper city authorities for a building permit authorizing them to begin the work. That department, thinking the premises to be in zone one, refused a permit because as to such a building, if in such zone, the municipal ordinances

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[1] "This Company for the term of one year . . . does insure Bowden L. Palmer and John Bruno, Jr. . . . to the extent of actual cash value of the property at time of loss, not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost or repair or reconstruction by reason of any ordinance or law regulating construction or repair."

[2] "The intention of this insurance is to make good the loss of rents, caused by fire or lightning, actually sustained by the insured on occupied or rented portions of the premises which have become untenantable, for and during such time as may be necessary to restore the premises to the same tenantable condition as before the fire."

"This Company shall be liable for no greater proportion thereof than the amount hereby insured ($5,000.00) bears to 100% of the actual annual rental for such occupied or rented portion of the premises when such loss shall happen."

[3] "In consideration of $75.00 additional premium, this Company shall be liable, in case of loss or damage under this policy, for loss or damage to the interest hereby (insured) occasioned by the enforcement of any State or Municipal law or ordinance regulating the construction or repair of buildings and in force at the time such loss occurs, but the total liability of this Company under this policy shall not exceed the amount for which this policy is issued, nor such proportion as the amount of this policy bears to the total insurance covering on the interest described in this policy, whether such insurance all contains the foregoing clause, or not."

prohibited the repair of a structure which did not conform to the structural type required for new buildings where the cost of repairs exceeded twenty per cent of the value of the building. (The insureds did not question the correctness of the ruling, though they had thought the building was located in fire zone two. Acting upon the ruling of the city engineering department, the adjuster for the insurance company attempted to settle the liability in accordance with the policy provisions, by the payment of $4200.00, this being the rentals for twelve months computed on the basis of the rents actually being received at the time of the fire.) Settlement was not consummated because the insureds demanded the full $5,000.00. Approximately two weeks later the insurance adjuster discovered that the property was actually located in fire zone two. In this zone the applicable ordinance permitted repairs up to fifty percent of the value of the property. This information was conveyed to the representative of the city building department, but he insisted nevertheless that the department was not going to issue any permit. The adjuster employed an attorney and made an additional effort to secure the permit, and in the meantime withdrew the offer of $4200.00, contending that there was no ordinance of the city which prevented the repairs and replacement of the building. Discussion and differences as to the application of the ordinances, as well as of the right of appeal from denial of the permit, continued between the parties, but the matter was not definitely determined. On July 27, 1948, the insureds filed a proof of loss with the insurance company and demanded payment. Suit was filed in November, 1948, claiming a loss of $5,000.00 covered by the terms of the policy, and in the alternative, for reformation of the policy to carry out the alleged intention of the parties that the policy should cover the loss of rentals "if any governmental agency (with or without cause of justification) refuse a permit to repair or rebuild as before, it is intended that coverage shall apply for duration of loss of rentals until $5,000.00 is expended." The defense was a denial of liability, especially predicated upon the contention that there was no ordinance in force at the time of the loss which could have been enforced to prevent repairs to the building,

and that the insureds neglected to make any reasonable effort to repair the building. As to the claim for reformation, the defendant asserted that the policy sought to be reformed was issued in renewal of a prior policy which, together with the policy in suit, had been accepted by the insureds with full knowledge of its contents.

Upon the trial of the case by the Court without a jury, the facts were fully developed. The Court made findings of fact and entered conclusions of law to the effect that both the insureds and the insurance adjuster and his attorney on behalf of the company had proceeded in good faith in an effort to obtain from the city authorities a permit for the repairs to the building. The Court found that the city authorities were in error in enforcing the ordinance as to fire zone two for the reason that the cost of repairs, found to be $7,000.00, did not exceed fifty percent of the "sound value" of the building. This the Court adjudged to be approximately sixteen thousand or seventeen thousand dollars at the time of the fire, and thus that the building was damaged to the extent "of probably forty percent of its sound value." The Court was of the opinion that reasonable prudence required the insureds to institute a mandamus proceeding to compel the issuance of the permit, but upon review of the times of holding Court and the statutes of Mississippi with reference to such a proceeding, together with the probable time required for an appeal, he determined that it would have required at least fifteen months to have terminated such litigation. He concluded, however, that since the city authorities had, even if erroneously, refused to issue a permit, and attempt by the insureds to repair would have been violative of an ordinance of the city forbidding any repair without a permit, and that the existence of this ordinance and the practical certainty of its enforcement brought the rental loss within the endorsement of the policy. He thereupon awarded judgment in favor of the insureds for $4200.00, the total loss insured under the provision of the usual rent endorsement which restricted recovery to the actual annual rentals for the rented portion of the premises "when such loss shall happen." One of the quarters was unoccupied at the time of the fire. He determined that

the claim for reformation was without merit, and denied it. The insurance company vigorously argues that the judgment was erroneous, and in no event should be for more than three month's rent, the period estimated necessary to make the repairs without regard to the question of the permit, insisting that since, as found by the Court, there was no ordinance of the city which prevented the repairs to the property, the acts of the city officials in denying the permit were unjustified and illegal, and therefore not the enforcement of a valid ordinance, within the terms of the endorsement; and that the Court erred in holding that the insureds could recover loss due to the failure and refusal of the city to issue a permit when such action was illegal and without cause or justification and not in the enforcement of a valid ordinance or statute. Counsel for appellant further asserts that the force given by the Court to the ordinance forbidding repairs without a permit, in effect granted the plea for reformation, which was expressly denied by the Court's conclusions of law. (The insureds in reply contend, that whether the city authorities were right or wrong in withholding the permit, their action was neither arbitrary nor unlawful, and that therefore the issuance of the permit could not have been compelled by mandamus. By cross appeal, the appellants assign error upon the adoption by the Court in its conclusions of the test of "sound value" instead of "market value" of the building at the time of the fire, and consequent error in its conclusions of law that the permit to repair was wrongfully refused and that its issuance could have been compelled by mandamus. Error is further assigned upon the failure of the Court to award judgment for the full amount of the face of the policy.)

We think the Court reached the right result in awarding judgment for $4200.00, and we therefore find no cause for reversal in the assignments of errors urged by the appellant. While we agree with the cross appellees upon their main contentions, we think the Court properly computed the amount of rentals lost for which the insureds were entitled to be compensated.

The intention of the insurer and the assureds, and the true nature and extent of the risk insured against, is clearly

evidenced by the recitals of the policy heretofore set forth in the footnotes, which progressively extend insurance coverage, when they are considered in the light of matters which the parties must be assumed to have known. Thus, the usual endorsement insuring loss of rents, which by its terms computed such loss upon the basis of the time reasonably necessary to reconstruct, uninfluenced by the necessity of compliance with any governmental regulation, was not sufficient to provide the coverage the insureds desired, and additional coverage was provided. (The building was in a city having in force zoning ordinances, of varying application, with the fact of their applicability in any case being dependent upon the location of the building and the result of the exercise of judgment by those in charge of enforcing the zoning regulations in determining whether, in any particular situation, the issuance of a permit for building or repair was authorized by the terms of the ordinances. It was likewise known that by the terms of such zoning ordinances it was entirely possible, and indeed likely, that if the building sustained any substantial loss as the result of fire the insureds could not replace the building at all but would be forced to demolish it, and consequently would lose not only one year's rentals, as provided by the policy, but additional rentals caused either by their financial inability to erect a structure complying with the requirements for new buildings or because of the time might be required to obtain the necessary materials and labor for such construction. Likewise knowledge that no repairs or rebuilding could be done at all until a permit therefor had been obtained, must be assumed. (The terms of the policy and its endorsements evidence a contract of insurance which in case of loss of rents occasioned by fire, required the insureds in good faith, and with reasonable prudence, as one who desired to restore the building to its former condition would exercise, to make proper application and attempt to secure from the proper authorities a permit to make such restoration. If such effort be made, a determination by the building authorities of the city, made in good faith, in the exercise of an informed judgment, under all of the facts known to such authorities, (especially where a question of value is the primary one), which finds a reasonable basis

for support in the terms and provisions of a city ordinance, concludes the question of insurance coverage. A loss of rentals resulting from such a determination is, within the terms of the endorsement, "occasioned by the enforcement of any State of Municipal law or ordinance regulating the construction and repair of buildings and in force at the time such loss occurs." Such a provision does not contemplate that the actual and conclusive effectiveness of the law or ordinance to prevent repairs or replacements, as determined only by a Court of last resort, and as the result of protracted litigation, shall be the test by which liability is ascertained. It does not impose upon the insureds an obligation to compel the issuance of a building repair permit. The existence of insurance coverage depends upon whether the application of the insureds and the determination of the building authorities, meets the standards we have outlined above. In the present case the finding by the Court that the insureds, as well as the insurance company, proceeded in good faith to procure a building repair permit is supported by the evidence. There was a mistake upon the part of the Assistant City Engineer in his first determination that the building was in fire zone one, and at that time he appraised the value of the building at $20,000.00. The mistake was shortly discovered and this appraisal of value was not accepted by his superior, the City Engineer. In view of the widely divergent evidence of value of the building, it is clear that here there was the proper basis for the exercise of a sound and honest judgment that the cost of repairs necessary to restore the building to its former condition exceeded fifty percent of the value of the building, and consequently, that the issuance of a permit therefor was prohibited by the terms of Sec. 65 (a)[4] of the ordinances of the City of Jackson, and Sec.

[4] "Major Alterations and Repairs. If alterations and/or repairs in excess of 50 per cent of the value of an existing building are made to such building within any period of twelve months, the entire building shall be made to conform with the requirements given herein for new buildings. Any existing building which for any reason whatsoever, requires repairs at any one time, in excess of 50 per cent of the value thereof, not deducting from such value any loss caused by fire or any other reason, shall be made to conform to the requirements of this Code or shall be demolished, except as specified in Section 186."

187 (c)[5] of the Building Code of the City of Jackson.) It is conceded by the insurance company that if the cost of repairs had exceeded fifty percent of the value of the building, the denial of the permit was proper. It is true that the insurance policy, as such policies usually do, makes sound value the criterion of measuring loss. (Here, however, we are not measuring loss under the policy, but under the city ordinances. The ordinances refer only to "value." In the course of the trial whenever the question of value arose, the insureds objected to the use of "sound value" in determining the applicability of the ordinance, contending that the word "value," used alone in the ordinance, should be construed to mean market value. The question here is not as to the computation of loss under the policy predicated upon any sound value, but upon the reasonableness of the application of the terms of the city ordinances so far as the issuance of a permit for repairs are concerned. The term "value" whenever used in statutes or contracts is generally held to mean market value. We recognize the difficulty of determining the "value," apart from land value, of a residence building located in the twilight zone of not yet a business, and yet not a residential, section, but leased to commercial tenants, in view of the fact that the most valuable use of the lot itself is for the erection of a business structure not at all of the type of the building presently upon it. But we do not think that "sound value" is the proper criterion. The "market value" of such a building is difficult of ascertainment, but no more so than is often experienced in estimating "just compensation" in eminent domain proceedings.[6]

In the present case, the insurance company, apparently as a side issue to discredit the bona fides of the efforts of the insureds to secure a building permit, sought and obtained testimony that the witness "had rather have $5,000.00 than the building." Furthermore, even in ascertaining "sound

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[5] "Any building in Fire Zone No. 2, which is enlarged, altered, raised or built upon to an extent exceeding an expenditure of 50 per cent of the value of such building shall be made to comply with the requirements of a new building in such fire zone."

[6] See *Miller* v. *U. S.*, 317 U. S. 369, 373-4, and citations.

value," it is clear that allowance should be made for economic depreciation. This factor was taken into account by one witness who estimated a reasonable sound value of $9,000.00, but was not considered in the estimates of other witnesses, nor apparently by the Court. It was also shown by the evidence that many such buildings, similarly situated, had been given away to avoid the cost of their demolition and removal. All in all, it is clear from the evidence that there is ample support for a good faith determination, in the exercise of sound judgment, that the costs of repairs necessary to restore the building would exceed fifty percent of its value. Consequently, the refusal to issue the building permit was neither arbitrary nor unreasonable, and from this follows the event insured against, that is, that the loss of rentals was occasioned by the enforcement of a municipal ordinance in force at the time of the loss. Since we rule this question against the contention of the insurance company, no good purpose could be served by any discussion of the propriety of the Court's conclusion that the existence of the ordinance forbidding repairs unless a permit had been obtained from the building authorities, in itself brought the case within the terms of the endorsement.

While the demolition and increased cost of construction clause of the policy greatly enlarged the coverage of the policy as to the event occasioning the loss of rents, it in no way effected a change in the manner in which the amount of loss was to be computed as contained in the provisions of the usual rent endorsement. As before stated, the terms of the insurance contract are to be construed and applied in accordance with the provisions of the policy and each of the endorsements. The applicable provisions restricts the liability of the Company to loss for no greater proportion thereof than the amount insured ($5,000.00) "bears to one hundred percent of the actual rentals for such occupied or rented portion of the premises when such loss shall happen." At the time of the fire one of the quarters was vacant. The rent then being received was $350.00 a month. On an annual basis this amounted to $4200.00, the amount awarded by the judgment of the Court.

Even though we do not approve all of the reasoning of the trial Judge, he reached the right result, and consequently no reversible error appears. The judgment is affirmed.

A True copy:

Teste:

____ ____,

Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX 2

STANDARD POLICY

No. 221

176
OLD POLICY NO.

STOCK COMPANY

The World Fire and Marine Insurance Company

HARTFORD, CONNECTICUT

PERIL (S)		AMOUNT	RATE	PREMIUM
Fire and Lightning		$ 5000.00	1.312	$ 65.60
Extended Coverage (when endorsement attached)			.123	$ 6.15
Windstorm and Hail (when endorsement attached)		$		$
Demolition & Increased Cost of Construction Clause				$ 72.25
ADDITIONAL COVERAGES (WHEN ENDORSEMENT ATTACHED)			TOTAL PREMIUM	$ 144.00

No insurance attaches in connection with the above listed Perils unless specific "Premium" therefor is specified in the face of this policy (or in endorsements attached hereto).

In Consideration of the Provisions and Stipulations Herein or Printed on the Back Hereof or Added Hereto AND OF the premium above specified

(or specified in endorsement attached hereto) this Company, for the term of ONE YEAR

from October 24, 1947 At Noon (Standard Time) to October 24, 1948 At Noon (Standard Time)

at location of property involved, to an amount not exceeding the amount(s) above specified,

does insure BOWDEN L. PALMER & JOHN BRUNO, JR.

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at

JACKSON, MISS.

Frank T. Bruck
Secretary

W. Ramsey McCain
President

Countersigned

this 12 day of Sept., 19 47 [illegible] Agent

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

Mississippi No. 135.

RENTS

$ 5000.00 On the rents of the two story frame building, with approved roof

situated No. 313 on the West side of North State Street

Block No. ....., in Jackson, Miss.

Occupied as Mercantile & Offices

This insurance is effected subject to the following conditions, which are hereby made warranties by the insured, and are accepted as parts of this contract:

The intention of this insurance is to make good the loss of rents, caused by fire or lightning, actually sustained by the insured on occupied or rented portions of the premises which have become untenantable, for and during such time as may be necessary to restore the premises to the same tenantable condition as before the fire. Said time, in case of disagreement to be determined by appraisement in the manner provided in the conditions of this policy.

Contribution Clause—It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that it is expressly stipulated and made a condition of the contract that, in event of loss, this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to 100 per cent. of the actual annual rental for such occupied or rented portion of the premises at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon. If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

If the insured occupies any portion of the premises, a fair rental value for the portions so occupied shall be considered as a part of the rents insured.

Attached to and forming part of Policy No. 221 of the

The World Fire & Marine
NAME OF INSURANCE COMPANY

Issued at its Jackson
CITY OR TOWN
Mississippi Agency.

Robinson & Julienne
Agent.
ROBINSON & JULIENNE

50 (135 Miss.—8-44) (Std. Policy)

Mississippi No. 466

EXTENDED COVERAGE ENDORSEMENT

(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, Smoke, Except as Hereinafter Provided)

Attached to and forming part of Policy No. 221 of the

The World Fire & Marine Co. (or insurance company)

Issued at its Jackson (office or town) Mississippi Agency.

ROBINSON & JULIENNE Agent.

Rate for extended coverage, included

In consideration of $ ..... premium, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES AND SMOKE

This endorsement does not increase the amount or amounts of insurance provided in the policy to which it is attached.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately

Substitution of Terms: In the application of the provisions of this policy, including riders and endorsements (but not this endorsement), to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the cases requires.

Apportionment Clause: This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, whether valid or not and whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether valid or not and whether collectible or not, covering in any manner such loss. Furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to each unit specifically insured, as the value of each unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not.

Glass Clause: It is expressly stipulated as applicable to all perils included in this endorsement that only such proportion of the insurance under this policy on any building covers on plate, stained, leaded or cathedral glass therein as the value of such glass which is damaged bears to the total value of said building.

Waiver of Policy Provisions: A claim for loss from perils included in this endorsement shall not be barred because building is not as owned owned by the insured in fee simple, factory operations have ceased, of change of occupancy.

DEMOLITION AND INCREASED COST OF CONSTRUCTION CLAUSE
(Rents)

In consideration of $75.00 additional premium, this Company shall be liable, in case of loss or damage under this policy, for loss or damage to the interest hereby occasioned by the enforcement of any State or Municipal law or ordinance regulating the construction or repair of buildings and in force at the time such loss occurs, but the total liability of this Company under this policy shall not exceed the amount for which this policy is issued, nor such proportion as the amount of this policy bears to the total insurance covering on the interest described in this policy, whether such insurance all contains the foregoing clause, or not.

If this policy covers in more than one building, the foregoing liability shall attach in each building separately not exceeding the amount specifically insured therein, or if it does not attach in each building in a specific amount, in proportion as the sound value in each building bears to the sound value in all.

Attached to and forming part of World Fire & Marine Policy No. 221. Issued at it's Jackson, Mississippi, Agency.

Robinson & Julienne

ROBINSON & JULIENNE AGENTS

Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snow storm, tidal wave, high water or overflow, whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the insured property therein caused, (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form attached to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property: (a) grain, hay, straw or other crops outside of buildings, or (b) windmills, windpumps or their towers, or (c) crop silos (or their contents), or (d) cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (e) buildings (or their contents) in process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

Provisions Applicable Only to Explosion: This Company shall not be liable for loss by explosion, rupture or bursting of steam boilers, steam pipes, steam turbines, steam engines, fly-wheels owned, operated or controlled by the insured or located in the building(s) described in this policy.

Any other explosion clause made a part of this policy is superseded by this endorsement.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company shall not be liable, however, for loss resulting from damage to or destruction of the described property owing to change in temperature or interruption of operations resulting from riot or strike or occupancy by striking employees or civil commotion, whether or not such loss, due to change in temperature or interruption of operations, is covered by this policy as to other perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: Loss by "aircraft" includes direct loss by objects falling therefrom. The term "vehicles," as used in this endorsement, means vehicles running on land or tracks but not aircraft. This Company shall not be liable, however, for loss (a) by any vehicle owned or operated by the Insured or by any tenant of the described premises; (b) by vehicles to fences, driveways, walks or lawns; (c) to aircraft or vehicles including their contents other than stocks of aircraft or vehicles in process of manufacture or for sale.

Provisions Applicable Only to Smoke: The term "smoke" as used in this endorsement means only smoke due to a sudden, unusual and faulty operation of any heating or cooking unit, only when such unit is connected to a chimney by a smoke pipe, and while in or on the premises described in this policy, excluding, however, smoke from fireplaces or industrial apparatus.

Provisions Applicable Only when this endorsement is attached to a Policy Covering Business Interruption (Use and Occupancy), Extra Expense, Additional Living Expense, Rents, Leasehold Interest or Profits and Commissions: When this endorsement is attached to a policy covering Business Interruption (Use and Occupancy), Extra Expense, Additional Living Expense, Rents, Leasehold Interest, Profits and Commissions, the term "Aircraft" as used herein is limited and conditioned in such a manner

APPENDIX III

SECTION 68, MUNICIPAL ORDINANCES OF THE CITY OF JACKSON, MISSISSIPPI

"68. The application, plans and specifications filed by an applicant for a permit shall be checked by the Building Inspector and if found to be in conformity with the requirements of this Code and all other laws or ordinances applicable thereto, the Building Inspector shall upon receipt of the required permit fee issue a permit therefor.

APPENDIX IV

Section 1 of the Constitution of the State of Mississippi:

The powers of the government of the state of Mississippi shall be divided int three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Section 14 of the Bill of Rights of the state of Mississippi:

No person shall be deprived of life, liberty, or property except by due process of law.

Section 17 of the Constitution of the State of Mississippi:

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

Section 24 of the Constitution of the State of Mississippi:

All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall

have remedy by due course of law, and right and justice shall be administered without sale, denia, or delay.

Federal Rules of Civil Procedure for the District Courts of the United States, 52(a), contains the following language:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Section 3590, Mississippi Code of 1942:

Standard state zoning law.—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of any municipality of over 1,500 inhabitants is hereby empowered to regulate the height, number of stories and size of buildings and other structures; the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes, and shall for playgrounds and public parks, possess the power, wherein requisity, of eminent domain and the right to apply public money thereto, and may issue bonds therefor as by law otherwise permitted.

Section 3591, Mississippi Code of 1942:

Districts.—For any and all of said purposes, the municipal body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of the foregoing section; and within

such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations on one district may differ from those in other districts. The said municipalities may impose such terms as deemed requisite when new subdivisions are laid out before allowing dedication and may receive easements in any land affected hereunder whereby this law may be made effective.

Section 3593, Mississippi Code of 1942:

Method of procedure.—The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time, amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing, in relation thereto, at which parties in interest, and citizens, shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

Section 3595, Mississippi Code of 1942:

Engineering department to be used.—In order to do such zoning the legislative body may utilize the city engineering department or an advisory committee of citizens of such number as it may determine, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. A preliminary report may be made, and public hearings thereon before submitting its final report, may be had.

FILED
SEP 20 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 255

THE WORLD FIRE & MARINE INSURANCE COMPANY,

Petitioner

versus

EDWARD L. PALMER AND JOHN BRUNO, JR.,

Respondents

BRIEF OF RESPONDENTS

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Jackson, Mississippi

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 265

THE WORLD FIRE & MARINE INSURANCE COMPANY,

Petitioner

versus

BOWDEN L. PALMER AND JOHN BRUNO, JR.,

Respondents

BRIEF OF RESPONDENTS

Introductory

The respondents initially instituted this suit in the state court from whence it was moved by petitioner to the United States District Court at Jackson, Mississippi, to recover on a Policy of Rent Insurance.

The respondents had tenants in the insured building who were currently paying $350.00 per month rent when the house in Jackson was so badly damaged by fire on June 9, 1948 that the City of Jackson, Mississippi, refused both

the owners (respondents) and petitioner a permit to repair the same.

The respondents contended that they were entitled to recover $5,000, or the full face amount of the policy, under the Demolition and Increased Cost of Construction clause specially inserted in the policy at the cost of $75.00. (See clause appearing at Page 47 of petitioner's brief—not included in record.)

The petitioner on the other hand contended that the City of Jackson wrongfully withheld such permit and that the policy should be construed just as if the special demolition clause were not attached thereto, and that under the Rents Clause in the base policy (appearing at P. 46 of petitioner's brief—not included in record) it was liable to the respondents for only three months' rent at $350.00 per month.

The District Court awarded respondents a decree for twelve months' rent at $350.00 per month, or $4,200.00. The petitioner appealed to the United States Court of Appeals for the Fifth Circuit where the decree was affirmed on direct and cross-appeal but the Court of Appeals disagreed with the District Judge on some of his legal conclusions and reasons for his decree.

Admittedly, the respondents lost more than a year's rent on these premises by reason of this fire. The City of Jackson refused to grant a permit to repair this property at the request of the respondents and the petitioner. There are several zoning ordinances in the City of Jackson (two of which are referred to and quoted in the foot-notes to the opinion of the Court of Appeals), which authorized the Building Department of the municipality to withhold this permit. The District Judge found that respondents tried in good faith to get such building permit (R. 389). The adjuster and attorney for petitioner likewise tried in good

faith to get such building permit (R. 389-390). The city officials acted in good faith in refusing such permit (R. 391). The respondents could not make such repairs without a permit without violating a criminal ordinance of the city. (R. 390). This ordinance was sent to the Court of Appeals, (R. 412) but is not in the record here except in the appendix to this brief.

The United States Court of Appeals decided this case compatibly with the laws of the State of Mississippi and consistently with every reported decision from any Circuit having a case in point, including every decision anywise in point cited by petitioner here.

STATEMENT OF FACTS

The undisputed facts in this case are: That petitioner's policy of Rent of Insurance, including the Demolition Clause, was in full force and effect and the increased premium for such additional coverage was fully paid when the frame residence was so badly damaged by fire on June 9, 1948, that their three commercial tenants on the premises were forced to vacate and later cancelled their leases which had more than a year to run at an aggregate rental of $350.-00 per month; that respondents thus suffered a loss of rents as a result of such fire in the aggregate principal amount of $4,200.00; that respondents had $7,500.00 of fire insurance on the house which was paid in full as a total loss during the pendency of this suit, and that the old frame property was razed by respondents in the latter part of 1949 on order of the City of Jackson; that the respondents tried in good faith to get the permit from the City of Jackson without effect, and the petitioner, likewise through their adjuster and their attorney appearing here, both tried without effect to get such permit; that the respondents did not and could not repair said property without a permit without

violating a criminal ordinance of the City of Jackson; that the petitioner was kept advised at all times by respondents of the result of their repeated efforts to get such permit but neither petitioner nor respondents sought to compel the issuance of such permit by judicial action.

The petitioner simply contends that there was no ordinance on the books of the municipality on June 9, 1948, to authorize the municipality to withhold such permit, and that therefore the Demolition Clause in its policy did not come into play.

The respondents on the other hand contend that there were two city ordinances cited in the opinion of the Court of Appeals which authorized the municipality to withhold this permit. The petitioner admits that if the residence were damaged by this fire in excess of fifty percent of its value that the municipality would have been authorized to refuse, as it did, to issue such permit.

The District Judge found that $7,000 would restore the building substantially to its condition before the fire. (R. 387). Here the Court will notice that the District Judge found the *sound* value of the building at the time of the fire to be $16,000 to $17,000 (R. 386); consequently, that it was damaged less than fifty percent of its *sound* value. (R. 391). The head of the Building Department of the City of Jackson, however, thought that $10,000 to $12,000 would be a big price for this building. (R. 174). The Chief Assistant to the Director of the Building Department (Mr. Manning) who refused the permit testified to the same effect. (R. 206-207).

Mr. Swep Taylor, a realtor of admitted qualifications, who is a member of the American Institute of Real Estate Appraisers, (R. 360) said that in his opinion the value of this building was $9,600.00. (R. 366). His appraisal was sent

to the Court of Appeals in original form (R. 404, Item 9), but is not included in the record before this court.

Petitioner's expert witness Wells, a realtor of wide experience in Jackson, thought that the value of the building was $4,761.50. (R. 267). The respondents, as owners of the building, thought it was worth less than $10,000.00 at the time of the fire (R. 100), and they would have sold the building at that time for $7,500.00. (R. 357). The Court of Appeals correctly held under such circumstances that the building was damaged by this fire in excess of fifty percent of its market value, as distinguished from the District Judge's view that approximately forty percent of the *sound* value of the building was damaged by the fire. The District Judge erroneously concluded as a matter of law that the municipality erroneously refused such permit; nevertheless, he awarded respondents one year's rent on the theory that they could not have forced the issuance of a permit within that time, and that they were entitled to be compensated for such loss of rents for that period. The Court of Appeals on the other hand disagreed with the District Judge in his use of *sound* value in arriving at the amount of the loss or damage to this building and properly held that this city ordinance referred to market value and not to *sound* value in accordance with the great weight of authority in this country on that point.

Precisely the Court of Appeals held, as respondents insisted throughout the trial of this case before the District Judge, that the term *value* in this ordinance meant market value and not *sound* value. Accordingly, the testimony of the respondents and the administrative officials of the Building Department of the City of Jackson and the realtor Taylor stand uncontradicted in this record to the effect that this building was damaged in excess of fifty percent of its value by this fire within the purview of the ordinances. It is respondents' contention that it was never their duty to litigate with the City of Jackson over the issuance of

this permit as a condition precedent to the benefit of the policy provisions. There was simply no clear abuse of discretion by the city officials shown in their refusal of this permit. It cannot be said from this record that the officials of the City of Jackson did not act with every degree of circumspection and propriety in refusing this permit in view of their considered opinion that this building was damaged in excess of fifty percent of its value as shown by their testimony, and that it could not be repaired or rebuilt with the same materials, or with conforming materials, at a permissive cost but that the building should be destroyed. (R. 47).

Initially the City officials gave a fallacious reason for refusing such permit but the head of the department concurred in such result but disagreed as to the reason therefor. (R. 184, 205).

Under such circumstances, it is submitted that this record does not present a case which warrants the review on certiorari by this Honorable Court.

ARGUMENT

The opinion of the Court of Appeals for the Fifth Circuit is in full accord with the laws of the State of Mississippi and is not contrary to the holding of any other Circuit on the same question.

At the outset, it is to be noted that there is no reported decision, either in Mississippi or from any other Court of Appeals, which deals with the exact question here except on principles. That fact alone should convince this court that there is absolutely no merit whatsoever in the Petition for Certiorari. The court could not have rendered a sounder or more equitable decision on the facts and cir-

cumstances in this case. It is to be borne in mind that the general agent of the petitioner was respondents' insurance adviser, and that he took great pains to fully acquaint petitioner with the fact that the only reason respondents needed this Demolition Clause in their policy was because the City of Jackson would most probably not permit the property to be repaired for commercial use in the event any appreciable damage was done to the property by fire. (R. 129, 130-1). Under such circumstances, the petitioner realized that its hazard under this particular policy was so great that it charged respondents $75.00 for that clause alone, which was more than the premium on the base policy (R. 61), and which was twice the amount it charged for the same clause in other states where they were written. (R. 281-2).

The policy contains no provision requiring respondents to take action against the municipal authorities to compel the issuance of a permit which the petitioner might consider improvidently or wrongfully withheld.

Both petitioner and respondents sought in good faith to get a permit to repair this building for commercial use as before the fire and such permit was refused. (R. 389). Neither petitioner nor respondents took any action against the City of Jackson to compel the issuance of such permit (R. 391), and as a consequence of such fire and resulting inability of the respondents to accommodate their tenants on such premises, they lost rents thereon for one year after the fire in the principal amount of $4,200.00. The petitioner seeks a review of such decree against it for that amount.

(a) Whether the City of Jackson be technically right or wrong in refusing to issue this permit, the respondents lost $4,200.00 in rents as a result of such fire and by reason of their inability to repair said property without a permit

and such hazard was within the coverage of such policy in suit.

Petitioner cites *Palatine Insurance Company v. Nunn*, 55 So. (Miss.) 44, in support of its petition but such authority clearly shows that such petition is without merit. That case involved a fire loss in Jackson, Mississippi, where the municipality would not permit a building which had been damaged by fire in the amount of $1,400.00 to be repaired. The policy in that case provided:

> "This company shall not be liable beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings."

In other words, the contract in that case expressly provided that the company should not be liable for a loss which was occasioned by the enforcement of a zoning ordinance, while in the case at bar the policy expressly provides in its Demolition Clause that the company "shall be liable for loss of rents occasioned by the enforcement of a city ordinance." Yet in the Nunn case, supra, the Supreme Court of Mississippi said:

> "It is thoroughly well settled that in such case, where the loss by fire is partial, but the injury by fire has rendered the building unfit for use for the purpose for which it was constructed, and there are ordinances or there is a law prohibiting its reconstruction, the loss in such cases is a total loss." (55 So. (Miss.) 45).

In that case the Supreme Court of Mississippi further significantly referred to *New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Insurance Co. of New Orleans*, 54 So. (La.) 466, which the Supreme Court of Mississippi said in that opinion that it was constrained to follow and thereby effectually adopted that decision.

The case of *New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Insurance Co. of New Orleans*, supra, involved many of the identical circumstances and contentions made in this case. There a building was partially destroyed by fire and the city engineer ruled that the insured should demolish the building and should not be given a permit to repair it. As in the *Nunn case*, supra, the policy exempted the company from loss occasioned by ordinance or law regulating construction or repair of buildings. The insured building did not come up to the requirements of the building ordinances adopted since its execution. The company conceded that the loss would be total, "if the condemnation of these walls by the city engineer had been justified by the facts, but contend that it was not; and that plaintiff acquiesced in it simply because it chimed in with plaintiff's secret intention not to reconstruct the building but to receive the insurance money and sell the naked lot." (54 So. La. 466).

The court in that case said:

> "We think plaintiff was clearly right in acquiescing in the opinion of the city engineer and of its own architect, and not engaging in a doubtful lawsuit with the city on the subject.****The defendant companies could have had the matter contested if they had so desired.****The action of the city engineer was presumably right.****Defendants had no right to require plaintiff to pull the chestnuts out of the fire for them; to play buffer between them and the city authorities. If they desired to have the matter contested, the door was open to them to have it done.**** In *Monteleone v. Insurance Co.* (La) 18 So. 472, 56 LRA 784, this court said that the exercise of the police power of the city may be erroneous, and is therefore subject to judicial control, *'but courts should not interfere with it, unless on very clear grounds.'* In the present case, after a full hearing of experts, the un-

wisdom of the action of the city engineer is by no means demonstrated."

Accordingly, the court in that case held the companies liable to the plaintiff on these policies in spite of said provision therein eliminating any loss occasioned by ordinance or law regulating construction or repair of buildings, and rejecting the company's suggestion that the action of the city engineer was arbitrary and unlawful. The court in that case expressly recognized the right of courts to supervise a municipal ordinance for its reasonableness but announced the familiar rule that courts will not interfere with municipal action except on very clear grounds which did not exist in that case, and do not exist in the case at bar. *Compare City of Jackson vs. McPherson* 130 So. (Miss.) 287.

The case at bar is not influenced by the valued policy provision of the Mississippi statutes which prohibit a fire insurance company from writing any clause in its policy to pay less than the face amount of the policy for a total loss of the insured property. No property was covered by the policy in suit but the policy merely covered the rents on or from such property. As stated, the insurer having the coverage on the building in the amount of $7,500.00 has fully paid that amount as a total loss to respondents. The petitioner simply undertook for an additional premium of $75.00 to insure respondents against loss of rents for as long as one year on said property by reason of the enforcement of any city ordinance which prevented the repair or rebuilding of the property.

The petitioner does not attack the reasonableness of the city ordinances which prevented the repair of this building, thereby resulting in the loss of the rents therefrom to respondents but they simply contend that the loss of these rents was not occasioned by the enforcement of any ordi-

nance of the City of Jackson. The record literally abounds with complete refutations of that false contention. The respondents concede that if the building were damaged by this fire in excess of fifty percent of its value, that at least two ordinances of the City of Jackson support the municipality in its refusal of such permit. The petitioner argues, as the District Judge found, that the building was damaged only to the extent of approximately forty percent of its *sound* value and that the municipal officers thus had no power or authority to rightfully refuse such permit on that account. The undisputed facts in this case, however, show that the head of the Building Department and his immediate subordinate, who actually refused this permit, thought that this building had a market value not in excess of $10,000 to $12,000. (R. 174). The undisputed proof showed that the actual damage to this building, admeasured in materials of which it was constructed and with which the city would not permit it to be repaired, would amount to approximately $7,000, as the District Judge held. (R. 387). It could not be more clearly demonstrated that these officials were thus fully authorized and empowered by *Section* 65 of the *City Ordinances* (footnote R. 422) and by *Section* 187 of the *City Ordinances* (footnote R. 422) to refuse this permit to the respondents, as they did. Likewise it may not be doubted that *Section* 78 of the City Ordinances, appearing in the Appendix to this brief and which constituted a part of the record in the Court of Appeals (R. 412) made it unlawful for respondents to repair said building without a permit, regardless of the reason which motivated the city officials in withholding it.

Obviously, under either circumstance and for either reason, and whether the city officials were right or wrong in withholding the permit, it cannot be doubted that these respondents paid the petitioner an extortionate premium for this identical protection which both parties previsioned and actually contemplated would be the circumstance in the event of a fire. But the petitioner argues that these city

ordinances refer and relate to *sound* values and not to market values as the District Judge held, but the great and overwhelming weight of authority in this country holds that the term "value" in an ordinance or statute means market value unless the ordinance or statute otherwise provides.

(b) The term "value" in the ordinances of the City of Jackson means market value and not *sound* value.

All the decisions cited by petitioner on the question of *sound* value are cases where buildings were insured and the policy of insurance expressly defined the term "value" as applied to such buildings to mean *sound* value. Consequently, those cases have no application whatsoever here where no tangible property is insured and we are not dealing with a case where a policy provision of that kind can have any application. The question here is as to the meaning of the term "value" in the city ordinance where it is provided that if the property is damaged by fire in excess of fifty percent of its value, that the entire building to be repaired may be required to conform to new building requirements in the area. If this building had been repaired after the fire to conform with new building requirements in the area, it would have cost $20,000. (R. 111).

But what is meant by the term "value" as used in this city ordinance? Under *Section* 1394, *Mississippi Code* 1930, "Rules — How words to be construed — All words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning."

The term "value" in this ordinance would thus be commonly understood by an average man to mean market value, or the translation into dollars of the equivalent in worth or amount which a thing would bring.

66 *C. J.* 419, says:

> "When applied without qualification to property, '*value*' means the price which it will command in the market, its equivalent amount in lawful money. 'Value' usually means 'market value'." Citing copious authorities from many jurisdictions.

In *Boynge v. Helvering, Commissioner,* (2CCA) 117 Fed. (2d), 157, 158, the court said:

> "The value of property, as has been so often said, is the opinion of people as to what it will fetch in exchange."

In 44 *Words & Phrases* (*permanent Ed.*) p. 52, it is said:

> "Property may have 'value,' under Rev. Codes 1921, Sec.-8689, fixing measure of damages for conversion as value of property, though there is no market for it, notwithstanding the fact that value, as used in statute, generally means market value. *Durocher v. Myers,* 224 Pac. 1062."

In 44 *Words & Phrases* at the same page, in *Allen v. Commissioner of Corporations and Taxation,* (*Mass.*) 70 A. L. R. 1299, it is said:

> " 'Value' as used in statute providing for income tax fixing basis for determining gains or losses from sale of capital assets, held 'market value,' not 'acquisition value'."

At *Page* 10 *of the Pocketpart of said* 44 *Words and Phrases,* it is said:

> " 'Value' in connection with legal problems, ordinarily means market value. *Bagdasarian v. Gragnon*, 192 Pac. (2d) 935."

On the same page it is further said:

> "The word 'value' as used in statute requiring town selectmen to appraise taxable property at its full and true value in money means 'sale value.' *Trustees of Phillips Exeter Academy v. Exter*, 33 Atl. (2d) 665, 671."

Webster's New International Dictionary, (2d. Ed.) defines "value" as:

> "That which is considered an equivalent in worth; monetary worth of a thing; marketable price; also worth as estimated in terms of currency or of another medium of exchange; as, What is the value of this watch?"

The construction placed by the Building Department of the City of Jackson on this term "value," is entitled to some weight here. Mr. Martin, as Director of the Building Department, and Mr. Manning, as his immediate subordinate, thought that $10,000 to $12,000 would be a big value for this building. (R. 174). That was the testimony of Mr. Martin and it was agreed that Mr. Manning would testify to the same effect. (R. 206-207). The owners of the property valued the building at $7500.00 (R. 100) and the insurance companies refused to write more than $7500.00 insurance on the building. (R. 101, 104, 146). There was simply no question but that this building was actually damaged by this fire in excess of fifty percent of its actual market value, regardless of any fictional basis whereby figures might be employed to deceive in showing a different *sound* value thereof. Here the respondents have collected

their insurance on the building itself as a total loss and have demolished the building because they could not use it as it was, and they were not allowed to repair it.

As previously indicated, the respondents are entitled to this rent insurance when they can show, as they did, that they lost this $4200.00 by reason of this fire, following which they were not permitted by the city officials under their interpretation of the ordinances to repair the building. Whether the city officials' construction of the ordinances, or whether their estimate of value, be right or wrong was not made a condition of the right of the respondents under this policy to recover their loss as a consequence of this fire. But for the Demolition Clause in this policy, admittedly, these respondents on this record would be entitled to recover under the base policy only three months' rent which the evidence showed would be ample time for the repair of this building to its former condition as before the fire if the City of Jackson would permit such repair thereof but the permit therefor was refused.

Yet the petitioner here seeks, as it has in every trial of this case, to get the court to construe this policy of insurance just as if the petitioner had not inserted the Demolition Clause in its policy at a cost of $75.00 to respondents.

The Supreme Court of Mississippi has never held that the term "value" in an ordinance or statute means *sound* value. The case of *Palatine Insurance Co. v. Nunn*, supra, cited by counsel to support their contention that the term "value" means *sound* value, nowhere even deals with that question but counsel says, of course, that the court meant *sound* value—the court simply did not so say.

The Court of Appeals in its opinion, Page 711 (reported *The World Fire & Marine Insurance Co. v. Palmer, et al,*

182 Fed. (2d) 707) correctly held that, "The term 'value' whenever used in statutes or contracts is generally held to mean market value."

Thus, the Court of Appeals properly concluded that the building in question was damaged by this fire in excess of fifty percent of its value, according to the undisputed proof of such market value thereof. (R. 365-6).

The Court of Appeals did not in any wise impinge upon Rule 52A in reaching such conclusion. There was doubtless sufficient evidence in the record to justify the trial judge in finding as a fact that the *sound* value of this building was $16,000 to $17,000. (R. 386). He made no finding as to the market value of said building; consequently, the trial judge's finding of fact as a matter of law was immaterial. Such factual conclusion of the trial judge on that point was certainly not binding upon the United States Court of Appeals.

The decision of the United States Court of Appeals construed the Demolition Clause to mean:

> "Such a provision does not contemplate that the actual and conclusive effectiveness of the law or ordinance to prevent repairs or replacements, as determined only by a Court of last resort, and as the result of protracted litigation, shall be the test by which liability is ascertained. It does not impose upon the insureds an obligation to compel the issuance of a building repair permit." (*The World Fire & Marine Insurance Co. v. Palmer*, et al., 182 F. (2d) 707, 711).

The Court of Appeals in this case at Page 710 of the opinion said that in the case of this kind it was the duty of the insured to make proper application for a permit and further said:

> "If such effort be made, a determination by the building authorities of the city, made in good faith, in the exercise of an informed judgment, under all of the facts known to such authorities, (especially where a question of value is the primary one), which finds a reasonable basis for support in the terms and provisions of a city ordinance, concludes the question of insurance coverage. A loss of rentals resulting from such a determination is, within the terms of the endorsement, 'occasioned by the enforcement of any state or municipal law or ordinance regulating the construction and repair of buildings and in force at the time such loss occurs'."

Fully analyzed and understood, the position of the petitioner resolves itself into a mere disputation with the city authorities over the factual conclusion which they reached as to the value of this property at a time when there were three city ordinances which deprived respondents of this permit. The petitioner occupies an anomalous position in this suit since it repeatedly stated to the trial judge, and he incorporated such statement in his finding (R. 390) that if this building were damaged by this fire in excess of fifty percent of its value, that the petitioner would have no defense to this suit. Yet that is exactly what this record shows—that this property was damaged by this fire in excess of fifty percent of its value and the United States Court of Appeals so held. The petitioner, however, continues to argue that the property was not damaged to such extent, and that the action of the City of Jackson was arbitrary and that consequently, the loss of respondents was not occasioned within the coverage of its policy. The decision of the United States Court of Appeals in this case is abundantly supported by *Palatine Insurance Company v. Nunn*, 55 So. (Miss.) 44, following *New Orleans Real Estate, etc. Co. v. Teutonia Insurance Co.*, 54 So. (La.) 466. That decision is in full accord with *City of New York Fire Ins. Co. v. Chap-*

man, (7 CCA) 76 Fed. (2d) 76; *Princess Garment Co. v. Fireman's Fund Ins. Co.,* (6CCA) 115 Fed. (2d) 380; *Rutherford v. Royal Ins. Co.* (4 CCA), 12 Fed. (2d) 880, 49 ALR 814; and *Liverpool & London & Globe Ins. Co. v. Nebraska S. Warehouses,* (8CCA) 96 Fed. (2d) 30, 35, where the court said:

> "The applicable rule of law approved by this court in *St. Paul Fire & Marine Ins. Co. v. Eldracher,* 8 Cir. 33 Fed. 2d. 675, 682, is concisely stated in 26 *C. J.* 351, as follows: 'If by reason of public regulations as to the rebuilding of buildings destroyed by fire, such rebuilding is prohibited, the loss is total, although some portion of the building remains which might otherwise have been available in rebuilding. So, also, if the insured building is so injured by the fire as to be unsafe and is condemned by the municipal authorities, the loss is total.'
>
> "The rule so stated appears to be supported by the great weight of authority. *Dinneen v. American Ins. Co.,* 98 Neb. 97, 152 NW 307, LRA 1915E, 618; Ann. Cas. 1917B 1246; *Rutherford v. Royal Ins. Co.,* 4 Cir. 12 F. 2d. 880, 49 ALR 814; *Larkin v. Glen Falls Ins. Co.,* 80 Minn. 527, 83 NW 409, 81 Am. St. Rep. 286; *Lux v. Insurance Co.,* 221 Mo. App. 999, 295 SW 847.
>
> "The issue before the court upon the trial was whether the loss was partial or total. To render the order of condemnation admissible it was necessary to show, by competent evidence, that the building was condemned because it was 'so injured by the fire as to be unsafe.' That is, there must appear to have been a casual relation between the injured condition of the building resulting from the fire and the condemnation. Otherwise the condemnation was not relevant."

Cf. *Franklin Ins. Co. v. Brewer*, 159 So. (Miss.) 545.

It is without dispute in this record that the parties intended that this policy as written should cover this loss which was actually previsioned by the parties when the policy was taken. (R. 148-149). The petitioner's agent who wrote the policy in suit persuaded respondents to accept the contract and pay the very high premium thereon because they would lose rent on this property in the event of a fire because the city would not permit it to be rebuilt. (R. 29-30). In the letter of transmittal of the contract of insurance, the agent wrote: "Due to the city ordinance, the building cannot be replaced, and in order to cover the loss due to the inability to rebuild due to the city ordinarce, the additional premium of $65.65 was charged." (R. 61). Because of the known hazard the petitioner charged a double premium for this Demolition Clause. (R. 281-282). The petitioner seeks a construction of the contract most favorable to it in this case but the rule is that such contract must be construed most strongly against the insurer and not the insured.

In 44 *C. J. S., Section* 297, pp. 1165-1166., it is provided:

> "An insurance contract or policy should be liberally construed to accomplish the purpose or object for which it is made.
>
> "A contract or policy of insurance should be given a liberal construction so as to uphold it and accomplish the purpose or object for which it is made, rather than a strict, technical construction which may defeat such purpose or object."

To the same effect is *Locomotive Engineers Mutual Life & Accident Insurance Co. v. Meeks*, 127 So. 699, where

the court refused to "Place a literal construction, but rather one of a practical value upon the terms of the policy," thereby construing the coverage to apply regardless of the actual language of the policy to comport with the intention and purpose of the parties in effecting the insurance.

The court will notice from the opinion of the United States Court of Appeals that it pretermitted a discussion of the existence of Section 78 of the City Ordinances making it a misdemeanor to do such work without a permit, since the court very properly concluded that the municipality acted neither arbitrarily nor unreasonably in withholding the permit. (Opinion of Court 182 Fed. (2d) 712). Yet aside from the fact that the city withheld this permit from the respondents, whether right or wrong, still the City of Jackson had such ordinance, appearing as Section 78 and copied into the Appendix of this brief, which made it a misdemeanor to make such repairs without a permit. It follows, as the night the day, that the respondents lost $4200.00 in rents for the year following the fire because they could not repair said building without violating the law. That in and of itself would appear to clearly bring respondents' case within the purview of petitioner's policy.

CONCLUSION

In conclusion, neither the record nor this petition in any wise presents any special or important reasons for a certiorari in this case. On the other hand, petitioner has not cited one authority to bear out its contention that any important question of local law has been decided by the United States Court of Appeals in probable conflict with local decisions or with any decision of any other Circuit on the point; but, on the contrary, the decisions cited by petitioner actually demonstrate the fallacy of its contention and

position here and clearly demonstrate that its petition should be denied.

It is submitted that under Rule 30 of this Court, Paragraphs 2 and 3 thereof, that respondents are entitled to a judgment here against petitioner and its sureties for the amount of this judgment with six percent interest thereon and ten percent damages under said rule. This is a case in equity and it cannot be gainsaid by the court that the petitioner's action here is for mere purposes of delay; and being a case in equity, unless the court otherwise expressly decrees, the respondents are entitled to these damages as a matter of vested right under this rule. The petitioner has not brought the complete record before this court—has brought none of the original exhibits shown at Record 404 and none of the ordinances introduced by agreement at Record 412—thereby clearly demonstrating the lack of merit in its petition.

Most Respectfully Submitted,

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Attorney for Respondents,
Jackson, Mississippi.

APPENDIX

Section 67, *Revised Ordinances of the City of Jackson* 1938:

No person shall erect or construct or proceed with the erection or construction of any building or structure, nor add to, enlarge, move, improve, alter, repair, convert, extend or demolish any building or structure, or cause the same to be done, without first obtaining a building permit therefor from the Building Inspector.

Section 74, *Revised Ordinances of the City of Jackson* 1938:

Any building or portion thereof, including buildings and or structures in process of erection, if found to be dangerous to persons or property, or unsafe for the purpose for which it is being used, or in danger from fire due to defects in construction, or dangerous for use because of insufficient means of egress in case of fire, or which violates the provisions of this Code due to the removal, decay, deterioration or the falling off of any thing, appliance, device or requirement originally required by this Code, or which has become damaged by the elements of fire to an extent of 50 per cent of its value, may be condemned by the Building Inspector. The Building Inspector may order portions of the structural frame of a building or structure to be exposed for inspection when in his opinion they are in an unsafe condition. In any of the aforesaid cases the Building Inspector shall serve notice in writing on the owner, reputed owner or person in charge of such a building or premises, setting forth what must be done to make such building safe. The person receiving such notice shall commence within forty eight hours (48) thereafter to make the changes, repairs or alterations set out in such notice and diligently proceed with such work or demolish the building. No such building shall be occupied or used for any purpose after the Building Inspector serves written notice of its unsafe or dangerous condition until the instructions of the Building Inspector have been complied with.

Section 78, *Revised Ordinances of the City of Jackson* 1938:

It shall be unlawful for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, remove, demolish, convert, equip, use or occupy or maintain any building and/or structure or any portion of any building and/or structure in the city, contrary to or in violation of

any provision of this code or to cause, permit or suffer the same to be done.

Any person, firm, or corporation violating any of the provisions of this Code shall be deemed guilty of a misdemeanor and each such person shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violation of any of the provisions of this Code is committed, continued or permitted, and upon the conviction of any such violation such person shall be punishable by fine of not more than One Hundred Dollars ($100.-00), or by imprisonment in the city jail for not more than thirty days (30), or both such fine and imprisonment.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 265

THE WORLD FIRE & MARINE INSURANCE COMPANY,

Petitioner,

vs.

BOWDEN L. PALMER AND JOHN BRUNO, JR.,

Respondents

REPLY BRIEF OF PETITIONER IN SUPPORT OF APPLICATION FOR CERTIORARI

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POINT I

No Liability under the Demolition Clause Involved

In order to determine liability under an insurance policy, it is necessary to ascertain the coverage, that is to say, the hazard against which the insurer agrees to protect the insured. It is stipulated, Appendix I, that a correct copy of the policy involved is made Appendix II (Application for Certiorari, Page 44). What is known as the Demolition Clause is expressed in unambiguous language. Under such clause the petitioner agreed to indemnify the respon-